SCOTT HARSHBARGER
Attorney General
of Massachusetts
One Ashburton Place
Boston, Massachusetts 02108-1698

HEIDI HEITKAMP
Attorney General
of North Dakota
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505-0040

JEFFREY R. HOWARD
Attorney General
of New Hampshire
33 Capitol Street
Concord, NH 03301-6397

HUBERT H. HUMPHREY III
Attorney General of Minnesota
State Capitol
Suite 102
Saint Paul, MN 55155

FRANK J. KELLEY
Attorney General of Michigan
525 West Ottawa Street
Lansing, MI 48909-0212

ANDREW KETTERER
Attorney General of Maine
State House Building
Augusta, ME 04333

THEODORE R. KULONGOSKI
Attorney General of Oregon
100 Justice Building
Salem, OR 97310

ALAN G. LANCE
Attorney General of Idaho
P.O. Box 83720
Boise, ID 83720-0010

DANIEL E. LUNGREN
Attorney General of California
1515 K Street, Suite 511
Sacramento, CA 95814

JOSEPH P. MAZUREK
Attorney General of Montana
Justice Building
P.O. Box 201401
Helena, MT 59620-1401

BETTY D. MONTGOMERY
Attorney General of Ohio
State Office Tower
30 East Broad Street
Columbus, OH 43266-0410

MIKE MOORE
Attorney General of Mississippi
Department of Justice
Post Office Box 220
Jackson, MS 39205-0220

DAN MORALES
Attorney General of Texas
Capitol Station
Post Office Box 12548
Austin, TX 78711-2548

PEDRO R. PIERLUISI
Attorney General
of Puerto Rico
Post Office Box 192
San Juan, PR 00902-0192

JEFFREY B. PINE
Attorney General of
Rhode Island
72 Pine Street
Providence, RI 02903

GARLAND PINKSTON, JR.
Acting D.C. Corporation
Counsel
441 4th Street NW
Washington, DC 20001

ERNEST D. PREATE JR.
Attorney General of
Pennsylvania
Strawberry Square
Harrisburg, PA 17120

JIM RYAN
Attorney General of Illinois
State of Illinois Center
100 West Randolph Street
Chicago, IL 60601

JEFF SESSIONS
Attorney General of Alabama
11 South Union Street
Montgomery, AL 36130

DON STENBERG
Attorney General of Nebraska
2115 State Capitol
Lincoln, NE 68509

CARLA J. STOVALL
Attorney General of Kansas
Judicial Building
301 West Tenth Street
Topeka, KS 66612-1597

TOM UDALL
Attorney General of
New Mexico
Post Office Drawer 1508
Santa Fe, NM 87504-1508

GRANT WOODS
Attorney General of Arizona
1275 West Washington Street
Phoenix, AZ 85007

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No. 94-688

In the

Supreme Court of the United States

October Term, 1994

NATIONAL PRIVATE TRUCK COUNCIL, INC.,
Petitioners,

v.

OKLAHOMA TAX COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari
To the Oklahoma Supreme Court

BRIEF OF THE STATES OF NEW JERSEY, et al. AS AMICI CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICI CURIAE

Amici States administer comprehensive tax schemes which include specific remedial procedures for taxpayers who wish to obtain tax refunds or to challenge particular tax laws. These procedures are designed to assure each State's fiscal integrity through the prompt and efficient collection of tax revenues, while at the same time affording aggrieved taxpayers a clear and certain means of obtaining relief from taxes alleged to have been assessed improperly. The specific tax collection procedures crafted by each of the amici States, including their remedial components, are crucial to the

States' ability to control their fiscal affairs and to function as independent sovereign entities.

Petitioners claim that in addition to providing relief to taxpayers pursuant to state law, state courts must also provide the federal remedy of 42 U.S.C. §1983 whenever taxpayers successfully challenge a state tax on the basis of the Commerce Clause of the United States Constitution. This approach would disrupt each State's method of providing taxpayer relief and would permit attorneys' fees to be awarded under 42 U.S.C. §1988 as a matter of course to taxpayers who successfully challenged a State tax as violative of the Commerce Clause, regardless of the good faith of the State taxing authorities or of the constitutional sufficiency of any other relief provided to the taxpayer by the State's remedial scheme.

Amici oppose any requirement obligating State courts to use the remedies of 42 U.S.C. §1983 as a substitute for adequate and comprehensive state remedies in taxpayer lawsuits based on the Commerce Clause. Accordingly, amici urge this Court to provide that in cases challenging a state tax, relief for state violations of the federal rights afforded by the Commerce Clause must be obtained exclusively through the use of each State's specific remedial scheme, so long as that scheme meets due process standards.

SUMMARY OF ARGUMENT

Petitioners claim they are entitled to supplement the relief they received from the Oklahoma Supreme Court under state law for a violation of the Commerce Clause through state taxation with additional relief that is available

under 42 U.S.C. §1983, namely attorneys' fees under 42 U.S.C. §1988. However, allowing a remedy under §1983 to supplant a taxpayer's plain, speedy and efficient state remedy would be contrary to the determination of Congress and this Court that in the area of state taxation, federal intrusion should be minimized. 28 U.S.C. §1341; *Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100 (1981). In addition, allowing a §1983 remedy as a substitute for state remedies would permit petitioner and others to bypass vital state procedures that both Congress and this Court have decided cannot be circumvented, creating the potential for significant disruption to the states' fiscal operations and integrity.

States are dependent on efficient and predictable tax collection to conduct their operations, and have devised tax appeal methods that are consistent with this need. This Court has consistently recognized that in light of this fact, federal court intrusion into state tax matters should be kept to a minimum and should only be exerted when federal rights will otherwise be lost. In passing the Tax Injunction Act, 28 U.S.C. §1341, Congress also recognized that in state tax matters, state courts and remedial processes should have primacy. Thus, although this Court has sometimes struck down state taxes as violative of the Commerce Clause, it has consistently allowed the states to determine the specific retroactive relief to be awarded in those cases, subject only to federal due process requirements.

Requiring state courts to provide relief for violations of the Commerce Clause pursuant to the federal standards of 42 U.S.C. §1983 is inconsistent with this Court's jurisprudence. The lenient attorneys' fees provisions of 42

U.S.C. §1988 are not appropriately applied in the area of state taxation. In addition, interstate businesses asserting a violation of the Commerce Clause under §1983 could also attempt to bypass the statutes of limitation, notice requirements, administrative remedies, and other procedures that the states have crafted for specific taxes and tax schemes. Thus, the deference to adequate state tax remedies and procedures that this Court has consistently observed would be destroyed.

Even if a taxpayer has a federal "right" under the Commerce Clause as that term is used in 42 U.S.C. §1983, this does not mean that he is entitled to the federal remedies provided by that statute. When a taxpayer asserts that a state tax violates the Commerce Clause and seeks a refund, the state is the real party in interest. However, a state is not a "person" subject to suit under §1983. Thus, a state that provides adequate tax relief for a Commerce Clause violation is providing relief pursuant to state law, not pursuant to §1983. Consistent with both 28 U.S.C. §1341 and 42 U.S.C. §1983, if this specific state remedy complies with due process, it should be the exclusive remedy available for a state's violation of the Commerce Clause.

If a state remedy for a Commerce Clause violation meets due process standards, the only effect of also requiring a remedy under §1983 will be to allow attorneys' fees based on the standards of 42 U.S.C. §1988 and to enable interstate businesses to bypass state tax procedures in favor of the more lenient standards of §1983. Use of these relaxed standards will significantly increase litigation over both taxes and fees and significantly discourage the full defense of those lawsuits. The result will likely be a substantial strain on state

resources and fiscal health, as well as the loss of state control over tax case management. In an area as critical as state taxation, states should be able to set their own standards for attorneys' fees, limitations periods, and other important procedures, so long as due process requirements are met.

Moreover, it is unnecessary to require states to award attorneys' fees pursuant to the lesser standards of §1988 as a means of deterring Commerce Clause violations. Based on this Court's precedents, when a state has enforced a tax that violates the Commerce Clause, it must provide predeprivation process or meaningful retroactive relief. In addition, this Court's decisions setting aside state taxes normally apply retroactively to all tax cases that are not final or time-barred. These standards subject states to potentially enormous liability for Commerce Clause violations at a time when state resources and taxing ability are already severely limited. Under the circumstances, adding the "deterrent" of attorneys' fees pursuant to §1988 is not legally or factually justified.

For these reasons, this Court should recognize a state remedy that complies with due process as the exclusive form of relief available when a taxpayer asserts that a state tax violates the Commerce Clause. Accordingly, it should affirm the judgment of the Oklahoma Supreme Court.

ARGUMENT

I. STATE COURTS SHOULD NOT BE REQUIRED TO USE THE REMEDIES PROVIDED BY 42 U.S.C. §1983 WHEN A STATE TAX VIOLATES THE COMMERCE CLAUSE, SO LONG AS THE STATE PROVIDES A PLAIN, SPEEDY AND EFFICIENT STATE REMEDY.

A. Requiring State Courts to Implement the Federal Remedies Provided by 42 U.S.C. §1983 in Place of State Remedies Would be Contrary to the Deference to State Remedies and Procedures Required by the Tax Injunction Act, 28 U.S.C. §1341, and to the Provisions of 42 U.S.C. §1983, Because It Would Substitute General Federal Remedies for the Specific Taxpayer Remedies Crafted by Each State.

Petitioners in this case successfully challenged an Oklahoma tax in the state courts on the basis of the Commerce Clause and obtained both declaratory relief setting the tax aside and refunds of all taxes paid since 1987. Petition for Writ of Certiorari at A-3, *National Private Truck Council, Inc. v. Oklahoma Tax Commission* (No. 94-688). Nevertheless, petitioners assert that the relief provided by the Oklahoma state courts was insufficient because it did not include certain relief available under 42 U.S.C. §1983, specifically an award of attorneys' fees pursuant to 42 U.S.C. §1988.[1] Petitioners thus ask this Court to require

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[1] As is apparent from petitioners' merits brief, the only relief petitioners now seek is an award of attorneys' fees under §1988. Pet. Brief at 20, n.11.

state courts to provide all relief available pursuant to §1983 when taxpayers succeed on a claim under the Commerce Clause, even if such relief is wholly unnecessary to enable the taxpayers to vindicate their federal rights.

Mandating state courts to provide this form of federal relief in taxpayer suits based on the Commerce Clause is contrary to both the Tax Injunction Act, 42 U.S.C. §1341, and 42 U.S.C. §1983. Moreover, requiring state courts to implement the remedies of §1983 in tax cases will represent a near-total repudiation of the well established principle of deference to adequate state procedures and remedies in the area of state taxation. Accordingly, this Court should make clear that taxpayers who challenge a state tax on the basis of the Commerce Clause must pursue the explicit remedies provided by state tax law rather than the remedies provided by §1983, so long as the state remedies comply with due process and constitute a "plain, speedy and efficient remedy" under 42 U.S.C. §1341.

1. States Have the Right to Fashion Their Own Remedies in State Tax Cases.

The general legal principle that a taxpayer challenging a state tax must avail himself of state remedies, even if his challenge is based on a federal ground, is indisputably longstanding. This principle is based on the fact that the States rely on taxation to carry on their functions, and that it is therefore critically important that federal courts interfere with State tax collection and enforcement as little as possible, particularly if the federal right can be asserted without federal court involvement. *Dows v. Chicago*, 11 Wall. 108, 110 (1871); *Matthews v. Rogers*, 284 U.S. 521,

525-26 (1931); *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 297-99 (1943); *Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976). It was on the basis of this principle that federal equity courts traditionally declined to enjoin state officers from enforcing allegedly unconstitutional state tax schemes, so long as the state provided an adequate legal remedy for any violation of the federal right asserted. See *Hillsborough v. Cromwell*, 326 U.S. 620, 622-23 (1945).

In 1937, Congress passed the Tax Injunction Act, 28 U.S.C. §1341. That Act prohibits federal district courts from enjoining, suspending or restraining the assessment, levy or collection of any tax under State law where a "plain, speedy and efficient remedy" may be had in the State courts. Thus, the Act codifies the federal courts' tradition of declining to enjoin state tax collection if violations of federal rights can be remedied through state court proceedings. *Fair Assessment in Real Estate Association v. McNary, supra*, 454 U.S. at 107-110 (1981).

The "plain, speedy and efficient remedy" that is required under 28 U.S.C. §1341 has never been construed to compel state courts to use the same remedies as their federal counterparts might have used. Rather, the requirement has been interpreted as a procedural command, and a "plain, speedy and efficient remedy" has been deemed to exist if it is clear that a taxpayer can fully assert his federal rights in the state forum and have them fully adjudicated. *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 512-521 (1980); *California v. Grace Brethren Church*, 457 U.S. 393, 411-412 (1982). See also *Fair Assessment in Real Estate Association v. McNary, supra*, 454 U.S. at 116, n.8 (describing the phrase "plain, speedy and efficient

remedy" as a reference to the "obvious precept that plaintiffs seeking protection of federal rights in federal courts should be remitted to their state remedies if their federal rights would not thereby be lost."). Based on this analysis, this Court has held that states must provide taxpayer remedies that comply with federal due process requirements, *McKesson v. Florida Alcoholic Beverage Commission*, 496 U.S. 18 (1990), but has never required states to provide to taxpayers the substantive remedies available under §1983, which include attorneys' fees under 42 U.S.C. §1988. See *Harper v. Virginia Department of Taxation*, 509 U.S. ___, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993).

Although the operative effect of 28 U.S.C. §1341 is to control federal court jurisdiction over state tax cases rather than to control the substance of state remedial schemes, this Court has consistently recognized the importance of deference to state remedies in the area of taxation and the underlying need to allow states to control their fiscal operations. Thus, this Court has repeatedly declined to allow federal courts to adjudicate taxpayer claims raising federal questions, based on the plain language of §1341, a recognition that federal interference will likely disrupt state tax collection and enforcement, and a recognition that Congress enacted §1341 based on the "imperative need of a State to administer its own fiscal operations" by applying its own remedies. *Tully v. Griffin*, *supra*, 429 U.S. at 73; *Rosewell v. LaSalle National Bank*, *supra*, 450 U.S. at 522. See also *Franchise Tax Board of California v. Alcan Aluminum Ltd.*, 493 U.S. 331 (1990); *Fair Assessment in Real Estate v. McNary*, *supra*, 454 U.S. at 112-114; *Great Lakes Dredge & Dock Co. v. Huffman*, *supra*, 319 U.S. at 297-99.

In addition, this Court has always given states the opportunity to determine the specific relief that should be provided in a lawsuit challenging a state tax under federal law and has required only that the relief comply with federal due process requirements. In *McKesson v. Florida Alcoholic Beverage Commission*, *supra*, the key case on this point, this Court held that a state was required to provide meaningful "backward-looking relief" to taxpayers who had been required to pay taxes which violated the Commerce Clause, because the taxpayers had been deprived of property and the Due Process Clause required either predeprivation process or the certainty of retroactive relief following the improper deprivation. 496 U.S. at 31. However, this Court did not require the state to provide a specific refund or any other specific relief. Indeed, the Court stated that the state retained flexibility to respond to the determination of invalidity and that it could take any number of actions to rectify the prior discrimination against interstate commerce. The suggested steps included granting a refund to the taxpayer, imposing a retroactive assessment on other taxpayers to create a nondiscriminatory scheme in hindsight, or some combination of these approaches, as well as the use of shortened statutes of limitation for refund claims. 496 U.S. at 40-41 and 45. The Court thus left the state free to choose the form of relief it would provide, "so long as that relief satisfies the minimum federal requirements we have outlined." 496 U.S. at 52. Those minimum requirements do not include attorneys' fees under 42 U.S.C. §1983 and §1988.

Following *McKesson*, this Court has continued to allow states to determine, subject to due process constraints, the precise form of retroactive relief they will provide when a taxpayer successfully challenges a state tax on a federal

basis. See, *e.g.*, *Associated Industries of Missouri v. Lohman*, ___ U.S. ___, 114 S. Ct. 1815, 128 L. Ed. 2d 639 (1994); *Harper v. Virginia Department of Taxation*, *supra*; *James M. Beam Distilling Company v. Georgia*, 501 U.S. ___, 111 S. Ct. 2439, 115 L. Ed. 2d 481 (1991). This approach recognizes that the remedy in a state tax case is a question of state law -even where a federal right is violated - and that the only federal constraint is that the state provide a clear and certain remedy that complies with federal due process requirements. See *Ashland Oil, Inc. v. Caryl*, 497 U.S. 916, 918 (1990); *James M. Beam*, *supra*; *Reich v. Collins*, ___ U.S. ___, 115 S. Ct. 547, 130 L. Ed. 2d 454 (1994). The approach also reflects the Court's longstanding recognition that states must be able to control tax collection and assessment so as to assure their continuing fiscal integrity, without unwarranted intrusion by the federal courts. See *California v. Grace Brethren Church*, *supra*, 457 U.S. at 408-413.

As 28 U.S.C. §1341 and these precedents demonstrate, both Congress and this Court have determined that the precise fashioning of remedies in state tax cases, even those involving the violation of a federal right, should be left to the states. Requiring state courts to include remedies under 42 U.S.C. §1983 in state tax cases would constitute an extreme departure from this well-founded deference to state remedies and would indirectly accomplish what this Court has consistently refused to allow directly: a federally-devised formula for relief in state tax cases.

2. Problems With Requiring the Use of §1983 Remedies in State Tax Cases.

In *Dennis v. Higgins*, 498 U.S. 274 (1991), this Court held that the Commerce Clause conferred individual federal rights within the meaning of 42 U.S.C. §1983. However, the decision in *Dennis* does not obligate states to provide all of the relief available pursuant to §1983 in addition to a plain, speedy and efficient state remedy that comports with due process. As has been repeatedly recognized, 42 U.S.C. §1983 does not create any federal rights, but simply provides a federal remedy and forum for their enforcement. *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 617 (1978); *Monroe v. Pape*, 365 U.S. 167 (1961). In *Dennis*, this Court described the petitioner's federal "rights" under the Commerce Clause as encompassing the right to engage in interstate commerce free from state discrimination and the right to obtain relief in a state forum pursuant to the due process standards enunciated in *McKesson v. Florida Alcoholic Beverage Commission*, *supra*. It did not hold that petitioner's rights included either the use of §1983 procedures or the availability of attorneys' fees pursuant to §1988 in state tax cases.[2]

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[2] In *Dennis*, the issue of whether the existence of a federal right under §1983 required state courts to use §1983 remedies in state tax cases was not fairly included in the question presented for review. Petition for Writ of Certiorari at i, *Dennis v. Higgins* (No. 89-1555). Therefore, it should not be concluded that the Court decided this issue in that case. Cf. *Izumi Seimitsu Kogyo Kabushi Kaisha v. U.S. Philips Corp.*, 510 U.S. ___, 114 S. Ct. 425, 126 L. Ed. 2d 396 (1993). Petitioners apparently concede this fact, as they assert only that it was "implicit" in *Dennis* that state courts are required to provide attorneys' fees under §1988. Pet. Brief at 30.

There is no need to provide a federal forum for the assertion of federal rights in state tax cases so long as those rights can be raised and adjudicated in a state forum, as occurred in this case. Indeed, if a state forum in which to raise federal rights is available and provides a plain speedy and efficient state remedy, 28 U.S.C. §1341 eliminates the federal forum as an option. *Rosewell v. LaSalle National Bank*, *supra*. Thus, in the case of challenges to state taxes, the provisions of §1341 directly conflict with one of the major purposes of §1983: providing a federal forum for the vindication of federal rights.

In addition, other inconsistencies between §1983 actions, 28 U.S.C. §1341, and this Court's precedents demonstrate that §1983 is an improper remedial vehicle to use in state tax cases. Taxpayers alleging that a state tax violates the Commerce Clause generally seek both declaratory relief and tax refunds, thereby bringing an action in which the State is indisputably the real party in interest. However, neither a State nor a state official sued in his official capacity is a "person" amenable to a suit for damages under §1983, because Congress did not intend to "include the sovereign states among those persons against whom §1983 actions would lie." *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 68 (1988). Thus, existing state remedial schemes which make tax refunds available for Commerce Clause violations are completely distinct from §1983 remedies and go beyond the relief that could be obtained from a state under §1983.

Moreover, while persons can bring a §1983 action for damages against a state official in his individual capacity, an allegation that a state tax law violates the Commerce Clause

clearly is not directed at the individual conduct of state tax officials, but at official state legislative activity. Thus, if plaintiffs are allowed to challenge state tax laws on the basis of §1983, state tax officials will be exposed to inappropriate requests for relief or to strained pleadings which inappropriately characterize their official conduct in enforcing state tax law as some form of individual misconduct. Since states are not proper defendants under §1983, neither states nor state officials should be compelled to expend resources to defend these types of actions. Cf. *Will*, *supra*, 491 U.S. at 71 (allowing a §1983 suit against a state officer in his official capacity "would allow petitioner to circumvent congressional intent by a mere pleading device.").

Similarly, requiring states to use §1983 remedies when adjudicating challenges to state taxes would create other conflicts. For example, exhaustion of administrative remedies is generally not required in a §1983 action. *Patsy v. Board of Regents of Florida*, 457 U.S. 496 (1982). However, administrative remedies are a major component of many State tax schemes, and this Court has consistently provided that a State may require those remedies to be exhausted before a state tax can be challenged in court on a federal ground. See *Swaggart Ministries v. California Board of Equalization*, 493 U.S. 378, 397-98 (1990); *First National Bank v. Board of County Commissioners*, 264 U.S. 450 (1924)(holding that a lawsuit seeking a tax refund based on the 14th Amendment was barred for failure to exhaust administrative remedies); *Fair Assessment in Real Estate v. McNary*, *supra*, 454 U.S. at 137-38 (Brennan, J., concurring).

Requiring states to use §1983 to adjudicate tax cases could allow taxpayers to bypass not only administrative remedies, but also any notice requirements specific to state tax schemes and any statutes of limitation specific to tax challenges. See *Felder v. Casey*, 487 U.S. 131 (1988)(holding that Wisconsin could not apply its notice of claim requirements to a §1983 action); *Wilson v. Garcia*, 471 U.S. 261 (1985)(the statute of limitations for §1983 actions is the state's statute of limitations for personal injury actions). These results would be completely at odds with the Tax Injunction Act, which provides that states can apply their own remedies and procedures in tax cases, as well as with the decisions of this Court cited above recognizing the states' rights to follow their own tax schemes when addressing federal claims, so long as those schemes comport with due process. See, *e.g.*, *McKesson v. Florida Alcoholic Beverage Commission*, *supra*, 496 U.S. at 45 (states can provide shortened statutes of limitation for tax refund cases when providing remedies in tax cases).

While statutes of limitation and notice requirements applicable to taxes vary by state and by tax, they bear no relationship to the statutes of limitation applicable to §1983 actions.[3] The specific timeframes set for challenging taxes

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[3] For example, New Jersey taxpayers have 90 days to bring a complaint in tax court challenging a decision of the Director of the Division of Taxation, up to four years to claim a tax refund from the Director in the absence of a tax assessment, and 90 days to challenge the denial of a refund claim. N.J.Stat.Ann. 59:51A-13; N.J.Stat.Ann. 59:49-14; N.J.Stat.Ann. 59:49-18(a). However, the New Jersey statute of limitations for personal injury actions based on negligence (and thus for §1983 actions) is two years. Similarly, in Texas a person who wishes to pay a tax under protest must bring an action within 90 days of the date the tax is paid or within 30 days after a refund claim is denied. Texas Tax

enable states to anticipate tax revenues with accuracy and therefore to plan and budget efficiently. States must be able to project with a high degree of certainty the amount of revenues they will receive during each budget cycle and have adopted rigid limitation and notice requirements for this reason. Indeed, statutes of limitation applicable to tax challenges are generally considered jurisdictional and inflexible. See, *e.g.*, *F.M.C. Stores Co. v. Morris Plains*, 100 N.J. 418, 425, 495 A. 2d 1313 (1985); *Community Federal Savings & Loan Association v. Director of Revenue*, 752 S.W. 2d 794, 799 (Mo. 1988), cert. den. 488 U.S. 893 (1988); *Riverview Properties Ltd. v. South Dakota State Board of Equalization*, 439 N.W. 2d 820 (S.D. 1989). Cf. *Jackson County Iron Co. v. Musolf*, 134 Wis. 2d 95, 369 N.W. 2d 323 (1986). In contrast, statutes of limitation for personal injury actions (and thus §1983 actions) may be subject to a state's equitable tolling considerations, discovery of injury rules, and other subjective criteria. Thus, introducing §1983 statutes of limitation into state tax schemes is likely to bring uncertainty into an area that is now extremely certain and in which certainty is critical.

In other instances when the provisions of §1983 directly conflicted with Congress' desire to defer to state proceedings and remedies, this Court has declined to allow

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Code §112.052(b); Texas Tax Code §112.151(c). As in New Jersey, however, the Texas statute of limitations for personal injury actions is two years. A summary of the timeframes applicable in each state to challenge state taxes is contained in State Tax Appeal Systems (1994), a document prepared by the Federation of Tax Administrators which has been lodged with the Court. As that summary indicates, states generally allow a taxpayer from 30 to 120 days to appeal the denial of a refund claim or to appeal a final tax assessment to the state courts. State Tax Appeal Systems, Appendices G and L.

§1983 to interfere with or supplant those state proceedings. In *Fair Assessment in Real Estate Association v. McNary*, *supra*, for instance, this Court held that a state tax could not be challenged in federal court under §1983, notwithstanding the otherwise broad scope of that statute, where a plain, speedy and efficient remedy was available in state court.[4] Similarly, in *Rosewell v. LaSalle National Bank*, *supra*, another case in which a state tax was challenged pursuant to §1983, this Court also did not allow a state tax remedy that it deemed "plain, speedy and efficient" to be bypassed through a federal court action.

Likewise, this Court has refused to countenance the use of §1983 to bypass important state proceedings in the non-tax context. In *Preiser v. Rodriguez*, 411 U.S. 475 (1973), for example, this Court held that a prisoner seeking to obtain release from confinement through a §1983 action could not use that action in lieu of seeking a writ of habeas corpus, because Congress had intended prisoners to exhaust adequate state remedies in a habeas action and this intent would be wholly frustrated if the exhaustion requirement could be evaded through a §1983 action. 411 U.S. at 489. The Court described the habeas exhaustion requirement as "rooted in comity" and as designed to give a state the first opportunity to correct its errors. 411 U.S. at 491.

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[4] The Court recognized in *McNary* that the State of Missouri would entertain plaintiff's §1983 claim in its courts. However, there is no indication in *McNary* that the Court intended to sanction the use of §1983 in state courts as a means of avoiding normal state procedures in tax cases or of getting attorneys' fees under §1988. See, *e.g.*, 454 U.S. at 116 n. 8 ("plaintiffs seeking protection of federal rights in federal courts should be remitted to their state remedies if their federal rights would not thereby be lost.").

More recently, in *Heck v. Humphrey*, ___ U.S. ___, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994), this Court again declined to allow a prisoner to avoid the exhaustion of state remedies required in a habeas action by bringing an action under §1983. The Court recognized that allowing the §1983 action to proceed would completely undermine the habeas exhaustion requirement; it therefore held that because the prisoner's §1983 claim was based on an assumption of illegal confinement, the claim would not accrue unless and until his conviction had been set aside.

Identical considerations underlie 28 U.S.C. §1341 and this Court's practice of allowing states to use their own processes to provide relief in tax cases, regardless of whether taxes are challenged on state or federal grounds. When Congress has established a specific remedial scheme for the violation of a federal right and has demonstrated that it wishes this scheme to be the exclusive method by which to obtain relief, a plaintiff cannot avoid the scheme by seeking potentially more favorable relief under 42 U.S.C. §1983. *Middlesex County Sewerage Authority v. National Sea Clammers*, 453 U.S. 1, 20-21 (1981);[5] *Smith v. Robinson*, 468 U.S. 992 (1984). Cf. *Schweiker v. Chilicky*, 487 U.S. 412 (1988)(a *Bivens* remedy was not available to obtain damages after improperly withheld social security benefits had been obtained, based on the alternative, comprehensive

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[5] In *Sea Clammers*, the Court did not allow a person asserting a violation of the Federal Water Pollution Control Act and the Marine Protection, Research and Sanctuaries Act of 1972 to bring a private action for damages under §1983, based on the specific statutory remedies provided in those Acts. The Court concluded that the existence of these express remedies foreclosed implied private actions and supplanted any remedy that would otherwise be available under §1983.

remedial scheme provided by Congress). Comprehensive state remedial schemes that allow taxpayers to challenge state taxes on the basis of federal law must be regarded as providing an alternative and exclusive remedy, based on 28 U.S.C. §1341 and on this Court's precedents.[6]

For all these reasons, petitioners' attempt to obtain supplemental relief under 42 U.S.C. §1983 should be rejected and this Court should hold that if a "plain, speedy and efficient" state remedy exists for a violation of the Commerce Clause through taxation, an action under §1983 cannot be pursued. This approach will be fully consistent with 28 U.S.C. §1341 and with this Court's decisions, which allow states to control their fiscal affairs by controlling the precise type of relief that taxpayers will receive, subject to due process requirements. It will also comport with this Court's longstanding recognition that the federal courts should not interfere with state tax procedures, as well as with this Court's refusal to allow the use of §1983 actions as a means of avoiding comprehensive state remedies that are

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[6] Petitioners devote the bulk of their brief to asserting that state courts must enforce federal rights and cannot discriminate against federal causes of action except on some neutral state ground. Amici do not dispute this general proposition. However, petitioners have failed to draw the important distinction between enforcement of federal rights in state courts and the requirement of federal remedies under §1983, and have failed to recognize that a federal right need not always be enforced through the mechanism of §1983. Moreover, §1983 was enacted specifically to provide a federal forum for the vindication of federal rights which it was feared the states would not otherwise enforce. *Will v. Michigan*, *supra*, 491 U.S. at 66. As this case demonstrates, state courts do enforce federal rights in the tax area and do set aside state taxes that violate the Commerce Clause. Finally, petitioners' general assertions also fail to recognize the unique nature of state tax cases and Congress' determination when it enacted 28 U.S.C. §1341 to subject federal rights to state remedial schemes.

entitled to federal deference and that Congress has determined must be pursued.

B. Allowing Taxpayers with a Plain, Speedy and Efficient State Remedy to Pursue Remedies under 42 U.S.C. §1983 Will Place an Unjustified Strain on States' Resources and Disrupt State Tax Schemes, and is Unnecessary as a Means of Deterring Violations of the Commerce Clause.

For the reasons stated above, recognizing a cause of action under §1983 would conflict with the deference to State tax remedies and procedures which Congress and this Court have determined is necessary. In addition, requiring relief under §1983 and attorneys' fees under §1988 would have other significantly adverse effects on state resources and would provide an unneeded inducement for increased litigation by interstate businesses.

When it enacted 42 U.S.C. §1988 in 1976, Congress intended to assure that individuals would not be deterred or prevented from seeking to vindicate their federal civil rights pursuant to §1983 because they could not afford to retain competent legal counsel. *Blanchard v. Bergeron*, 489 U.S. 87, 95 (1989); *Evans v. Jeff D.*, 475 U.S. 717 (1986). It therefore decided to upset the traditional "American Rule" in civil rights cases and to provide that a prevailing party could be awarded reasonable attorneys' fees, regardless of whether the party would have been entitled to fees under the "private attorney general" theory previously used by the federal courts. *Hensley v. Eckerhart*, 461 U.S. 424 (1983). Following the enactment of §1988, the numbers of cases filed pursuant to §1983 increased dramatically, as did the

amount of litigation over fees. *Pulliam v. Allen*, 466 U.S. 522, 556 (1983)(Powell, J., dissenting). Today, the availability of §1983 remedies, coupled with the availability of §1988 attorneys' fees, remains a highly significant source of litigation.

As the proliferation of §1983 actions since enactment of §1988 suggests, §1988 has been an effective vehicle to ensure enforcement of civil rights laws by individual plaintiffs. However, it is an exceedingly poor vehicle to ensure that state taxes comply with constitutional requirements, especially where state taxes are alleged to violate the Commerce Clause.[7]

First, allowing fees to be awarded in Commerce Clause cases based on the lenient standards of §1988 will undoubtedly significantly encourage litigation by interstate business and will simultaneously discourage or chill the full defense of those lawsuits by states. Pursuant to §1988, a "prevailing" plaintiff is a plaintiff who is successful on any significant issue, without regard to the defendant's good or bad faith in litigation. *Texas State Teachers' Association v.*

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[7] The fact that §1988 is a completely inappropriate standard for awarding attorneys' fees in state tax cases is underscored by the very different standard that is applicable to the Internal Revenue Service. Taxpayers who challenge their federal taxes are entitled to attorneys' fees only if they establish, among other things, that the government's position in the litigation was not "substantially justified." Moreover, attorneys' fees are not generally available in declaratory judgment actions, and are normally capped at $75 per hour. Only individuals and businesses with a net worth below a specified amount qualify to receive fees. 26 U.S.C. §7430(b)(3)(A); 26 U.S.C. §7430(c)(1)(B)(iii); 26 U.S.C. §7430(c)(4)(A)(i); 26 U.S.C. §7430(c)(4)(A)(iii); 28 U.S.C. §2412(d)(2)(B).

Garland Independent School District, 489 U.S. 782 (1989). Moreover, a "reasonable" fee under §1988 is based on market rates without regard to actual legal costs and may exceed the amount of damages obtained. *Blum v. Stenson*, 465 U.S. 886 (1984); *Riverside v. Rivera*, 477 U.S. 561 (1986).

Given these standards for awarding fees, there can be no doubt that prudent state officials who are faced with §1983 lawsuits in tax cases will be hesitant to defend them fully and will be consistently tempted to compromise tax cases. See *Fair Assessment in Real Estate Association v. McNary*, *supra*, 454 U.S. at 115. Thus, allowing §1983 suits will place an obvious strain on the states' fiscal resources, as states are simultaneously likely to become liable for increased attorneys' fees, become engaged in increased litigation involving both taxes and fees, and be deterred from collecting all taxes assessed. Moreover, these adverse impacts will likely occur many times over, because allowing taxpayers to use §1983 as a remedial vehicle will undoubtedly boost both the number of non-meritorious lawsuits filed to challenge state taxes and spawn an additional round of litigation based only on obtaining fees. Cf. *Burlington v. Dague*, 505 U.S. ___, 112 S. Ct. 2638, 120 L. Ed. 2d 449 (1992).

Second, requiring states to apply §1983 remedies in state tax cases will have other disruptive and unnecessary impacts on each state's management of its fiscal affairs. As discussed in Point I, *supra*, taxpayers filing claims under §1983 could claim immunity from the administrative procedures, notice requirements and statutes of limitation specific to state tax schemes. If, as is likely, the amount of

tax litigation increases based on the increased availability of attorneys' fees and on the claimed ability to bypass state tax procedures, the potential for disruption and confusion in each states' tax system will be substantial.

In addition, while taxpayers are currently subject to each state's laws regarding attorneys' fees, taxpayers filing §1983 actions would be subject to a general federal attorneys' fee provision entirely beyond the control of state legislatures. In an area as critical to independent sovereignty as taxation, the standards governing attorneys' fees should be left to the affected sovereign. If they are not, states will lose their ability to control tax litigation and therefore to control taxation.[8]

The States recognize full well that they may not violate the Commerce Clause through taxation. However, states are entitled to have interstate commerce pay its fair share of state taxes. *D.H. Holmes Company v. McNamara*, 486 U.S. 24, 31 (1988). Allowing interstate businesses to receive §1983 remedies will supply this group of taxpayers with an unneeded additional inducement to challenge state taxes, namely more lenient attorneys' fees provisions and the apparent ability to bypass state tax procedures. Nothing in the Commerce Clause requires this result. Moreover, supplying this litigation lure may cause the very effects

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[8] Some states have adopted attorneys' fees provisions for state tax cases that are similar to the standards applicable to the Internal Revenue Service referenced in footnote 7, *supra*. See, *e.g.*, N.J.Stat.Ann. 54:51A-22; Iowa Code §421.60(4); R.I. Gen. Laws §42-92-1 *et seq.* See also Mont. Code Ann. §25-10-711 (allowing fees where the state has brought or defended an action that was frivolous or pursued in bad faith); N.D. Cent. Code §28-32-21.1; Ky. Rev. Stat. §453.260.

which Congress sought to eliminate by enacting the Tax Injunction Act, namely an ability by interstate business to exercise excessive control over its tax liability. *Rosewell v. LaSalle National Bank*, *supra*, 450 U.S. at 525-27 (1980).[9]

If states with plain, speedy and efficient remedies already allow taxpayers to challenge a state tax on a federal ground and provide refund procedures, allowing an additional §1983 claim is at best redundant and at worst simply an invitation for increased litigation geared only towards obtaining attorneys' fees. In other contexts, this Court has recognized that the use of §1983 solely as a means to an attorneys' fee is not appropriate and has not allowed it. *North Carolina Department of Transportation v. Crest Street Community Center*, 479 U.S. 6 (1986)(plaintiffs who won an administrative proceeding could not subsequently bring a

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[9] Before passage of the Tax Injunction Act, the availability of a federal forum and the potential for obtaining injunctive relief allowed some interstate businesses to withhold state taxes and to "determine for themselves the amount of taxes they will pay." 81 Cong. Rec. 1416 (1937). Similarly, the availability of attorneys' fees under §1983 will likely discourage states from fully defending lawsuits based on the Commerce Clause and encourage them to compromise tax liability, thus giving taxpayer plaintiffs added control over the amount of taxes they must pay. Although any group of taxpayers asserting a violation of a federal right through taxation could also theoretically take advantage of §1983, they could not do so as readily as interstate businesses could. A state that wishes to have interstate business pay its fair share of taxes must devise formulas to accomplish this purpose, which may then be subject to immediate attack based on their practical effects. Thus, unlike any other type of taxpayers, interstate businesses constitute a readily identifiable group with a readily identifiable means of facially attacking state taxes. It may be necessary for interstate business to have this means of attack as a way to enforce the Commerce Clause. However, it is not necessary to add to this mix the further litigation lure of attorneys' fees.

separate §1983 action to obtain fees). Cf. *Rhodes v. Stewart*, 488 U.S. 1 (1988)(where the §1983 judgment had no impact because the prisoner had already been released, no fees could be awarded); *Farrar v. Hobby*, 506 U.S. ___, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992)(a plaintiff who sought $17 million in damages but was awarded $1 was the "prevailing" party but was not entitled to attorneys' fees); *Burlington v. Dague*, *supra*. This Court should do likewise in this case, by declining to allow a §1983 claim to be used in addition to or in place of an existing and constitutionally adequate state remedy solely as a way to obtain fees.[10]

Awarding attorneys' fees pursuant to the standards of 42 U.S.C. §1988 has been described as a way of deterring or penalizing conduct that violates federal law. *Hutto v. Finney*, 437 U.S. 678, 690-91 (1977). However, in Commerce Clause litigation the states are already subject to a number of significant deterrents. First, pursuant to 28 U.S.C. §1341, states must allow their taxes to be challenged and fully adjudicated on federal grounds or risk having that adjudication occur in a federal forum. Second, pursuant to *McKesson v. Florida Alcoholic Beverage Commission*, *supra*, if state taxes violate the Commerce Clause, states must provide predeprivation process or meaningful retroactive relief. Third, pursuant to *James M. Beam Distilling Co. v. Georgia*, *supra*, and *Harper v. Virginia Department of*

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[10] In *Farrar v. Hobby*, *supra*, this Court held that it was unreasonable to award fees under §1988 where the relief obtained was virtually non-existent in comparison to the relief sought. Section 1988, of course, provides that reasonable fees "may" be awarded. This Court can interpret this permissive language to preclude an award of attorneys' fees in state tax cases, just as it interpreted the term "reasonable" fees to preclude a fee award in *Farrar*.

Taxation, *supra*, this Court's decisions invalidating state taxes are normally applied retroactively to all cases that are not final and not time-barred.

The combined effect of these precedents is that states that violate the Commerce Clause through taxation are subject to enormous potential liability that can only be addressed through a series of difficult options.[11] Moreover, this liability has at times been imposed even where the violation was not reasonably foreseeable. This provides more than a sufficient deterrent to states not to adopt tax schemes which violate the Commerce Clause, particularly in an era when the states' resources and taxing abilities are already strained and they simply cannot afford to incur additional liability. Under the circumstances, imposing attorneys' fees pursuant to the standards §1988 as yet another "deterrent" is completely unwarranted.

For all these reasons, this Court should not accept petitioners' invitation to replace constitutionally adequate state tax remedies and procedures with the remedies of 42 U.S.C. §1983 whenever a state tax is challenged on the basis of the Commerce Clause. Requiring state courts to use §1983 remedies in such cases will allow taxpayers to bypass the plain, speedy and efficient state remedies that are already available and that Congress and this Court have recognized must be pursued. In addition, imposition of §1983 remedies will conflict with existing state procedures pertaining to tax collection and assessment, causing significant and

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[11] The fiscal impacts of this liability can be reduced by raising the taxes of other taxpayers, an option that is neither practical nor realistic in many cases. The alternative, reducing state services, may adversely affect other innocent taxpayers.

unwarranted disruption. Use of §1983 remedies will also increase tax litigation, discourage and undermine defense of state tax schemes, and strain existing state fiscal resources. Given the significant deterrents that already discourage states from violating the Commerce Clause, requiring states with plain, speedy and efficient tax remedies to also implement §1983 remedies is unwarranted, unwise and unnecessary.

CONCLUSION

For all of the foregoing reasons, the judgment of the Oklahoma Supreme Court should be affirmed.

Respectfully submitted,

DEBORAH T. PORITZ
Attorney General of New Jersey

JOSEPH L. YANNOTTI
Assistant Attorney General

* RACHEL HOROWITZ
Deputy Attorney General

Richard J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625
(609) 633-8119

Of Counsel:
Eleni M. Constantine
National Association
of Attorneys General
444 No. Capitol St.
Washington, D.C. 20001

Counsel for *Amici* States

* *Counsel of Record*
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